FILED
United States Court of Appeals
Tenth Circuit

July 8, 2016

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

In re: ODI LUKE-SANCHEZ, Movant.	No. 16-4116 (D.C. Nos. 2:08-CV-00442-TS & 2:05-CR-00205-TS-1) (D. Utah)

ORDER

Before **TYMKOVICH**, Chief Judge, **BRISCOE** and **HOLMES**, Circuit Judges.

Odi Luke-Sanchez, a federal prisoner proceeding pro se, seeks authorization to file a second or successive 28 U.S.C. § 2255 motion to vacate, set aside, or correct his sentence. For the following reasons, we deny authorization.

We may authorize the filing of a second or successive § 2255 motion if it is based on "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." 28 U.S.C. § 2255(h)(2); *see also id.* § 2244(b)(3)(C). Mr. Luke-Sanchez asserts that he is entitled to bring a successive § 2255 claim to challenge his conviction under 18 U.S.C. § 924(c) based on the new rule of constitutional law announced in *Johnson v. United States*, 135 S. Ct. 2551 (2015).

The *Johnson* decision voided in part the definition of a qualifying "violent felony" used for sentence enhancement under the Armed Career Criminal Act (ACCA). The problematic part of the definition is known as the "residual clause" and covers any crime "involv[ing] conduct that presents a serious potential risk of physical injury to another,"

18 U.S.C. § 924(e)(2)(B)(ii). In *Johnson*, the Supreme Court held that "imposing an increased sentence under the residual clause of the [ACCA] violates the Constitution's guarantee of due process." 135 S. Ct. at 2563. And in *Welch v. United States*, 136 S. Ct. 1257, 1268 (2016), the Court held that *Johnson* announced a new substantive rule that applies retroactively to cases on collateral review.

We recently extended *Johnson*'s reach to defendants seeking authorization who were designated as career offenders under U.S.S.G. § 4B1.1, based on predicate felony offenses that relied on the residual clause in the definition of "crime of violence" in U.S.S.G. § 4B1.2(a)(2). *See In re Encinias*, 821 F.3d 1224, 1225-26 (10th Cir. 2016) (per curiam). The residual-clause language in the career-offender guideline definition of "crime of violence" is identical to the residual-clause language that the Supreme Court found unconstitutionally vague in *Johnson*. *Id*. at 1225. We therefore concluded that a challenge to a sentence that relied on the residual clause in the definition of "crime of violence" in the career-offender guideline was sufficiently based on *Johnson* to permit authorization because "of the similarity of the clauses addressed . . . and the commonality of the constitutional concerns involved." *Id*. at 1226.

Mr. Luke-Sanchez, however, did not receive an increased sentence under either the ACCA or the career-offender provision of the guidelines. He was sentenced to 235 months in prison for possession of a firearm by an illegal alien in violation of 18 U.S.C. § 922(g)(5)(A) and possession of methamphetamine with intent to distribute in violation of 21 U.S.C. § 841(a)(1), as well as 60 months in prison for possession of a

firearm in furtherance of a drug trafficking crime in violation of 18 U.S.C. § 924(c)—a sentence that since has been reduced.

Mr. Luke-Sanchez contends that his § 924(c) conviction was based on that statute's residual clause, which he argues is also unconstitutionally vague. However, his conviction was clearly based on the portion of § 924(c) that provides for an increased sentence for possessing a firearm "during and in relation to any . . . drug trafficking crime" and possessing a firearm "in furtherance of any such crime," 18 U.S.C. § 924(c)(1)(A). And there is nothing in the definition of a "drug trafficking crime" that contains similar language to the residual clause invalidated in *Johnson* or implicates the same types of constitutional concerns at issue in *Johnson*. Mr. Luke-Sanchez has therefore failed to make a prima facie showing that he is entitled to authorization based on the new rule of constitutional law announced in *Johnson*.

Accordingly, we deny his motion. This denial of authorization "shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari." 28 U.S.C. § 2244(b)(3)(E).

Entered for the Court

ELISABETH A. SHUMAKER, Clerk